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STATE REGULATION OF PRICES UNDER THE FOURTEENTH AMENDMENT. — In the devious and somewhat whimsical history of the Fourteenth Amendment, while the courts have taken glances at the possibility of a state's embarkation upon a new economic route, they have never been called upon directly to face the question which would be raised by such a departure. But with the decision of the United States District Court for Montana that a statute giving a commission power to regulate the prices of all commodities is unconstitutional,¹ the fringe of that problem has been touched.

The causes which led to the passage of the Montana statute were the great increase in prices within the last few years, the curtailing of supplies and the straitened circumstances of a large part of the population of the state brought about by three successive years of drought, and the finding by a state commission that exorbitant profits were being made. The historical background of the act reaches to the Middle Ages. In England, from the fourteenth century, there were statutes fixing the prices in businesses not within the modern conception of public utilities,² and there is evidence that such statutes were passed by American provincial assemblies.³ During the Revolution, generally at the in-

¹ *Holter Hardware Co. v. Boyle*, the District Court of the United States for the District of Montana, No. 149 (1920). See RECENT CASES, p. 261, *infra*.

² See 23 EDW. III, Stat. I, c. 6 (1349); 25 HEN. VIII, c. 2 (1533); 31 GEO. II, c. 29, sect. 7, 20 (1758). See SHEPPARD, OFFICE OF COUNTY JUSTICE, part 2, c. 7, sect. 27; and STICKNEY, STATE CONTROL OF TRADE AND COMMERCE, chapters 1 and 3.

³ See 2 ACTS OF ASSEMBLY OF PROVINCE OF PENNSYLVANIA, 327 (act of 1758).

stigation of the Continental Congress,⁴ at least eight of the thirteen states passed laws fixing the price of almost every commodity in the market.⁵ These laws were evoked by what was considered the exorbitant increase in prices. Within a few years they all seem to have been repealed, partly because there was no machinery adequate to enforce them, partly because of resentment that a few of the states did not take part in the movement. At the time the Fifth Amendment was ratified, however, at least two states had statutes providing for the regulation of the price of bread.⁶

There is little authority even bearing on the point involved.⁷ In the Supreme Court's consideration of cases under the Fourteenth Amendment, the existence of Anglo-Saxon precedent for the statute⁸ and the conditions which led to its passage⁹ have been important and sometimes controlling factors. If a generalization may be ventured of the cases as a whole, the actual decisions, despite much discussion of the extent to which the businesses regulated were affected with a public interest, seem to involve no more than a determination of whether the aim of the legislature was a legitimate aim of state government, and, if so, whether the social interest was sufficiently strong to counterbalance the interference with individual interests¹⁰ — a question primarily for the legislature.¹¹

The aim of the Montana legislature — the protection of its citizens against extortion — has been held a proper function of government.¹²

⁴ 9 JOURNALS OF THE CONTINENTAL CONGRESS, 956 (resolution of Nov. 22, 1777).

⁵ ACTS AND LAWS OF CONNECTICUT, November Session, 1776: *An Act to Prevent Monopolies and Oppression by excessive and unreasonable Prices for many of the Necessaries and Conveniences of Life*, amended in May Session, 1777, and February Session, 1778; LAWS OF MARYLAND, June, 1777, c. XI, sect. 9; LAWS OF MARYLAND, October, 1778, c. VIII, sect. 8; MASSACHUSETTS LAWS, Third Session, January, 1777, c. XIV; amended in Fourth Session, May, 1777, c. XLVI; NEW HAMPSHIRE SESSION LAWS, 1777: *An Act for regulating the Prices of Sundry Articles*, p. 43, amended in the same year, p. 55; NEW JERSEY ACTS, Fourth Assembly, First Sitting, October, 1779, c. XII; LAWS OF NEW YORK, First Session, c. XXXIV (1778); LAWS OF PENNSYLVANIA, Second Assembly, Second Sitting, April, 1778, c. LX; RHODE ISLAND LAWS: *An Act to prevent Monopolies and Oppression, etc.*, December, 1776, amended in May, 1777. The Maryland act fixed a maximum rate of profit; the other acts set out the prices at which commodities could be sold.

⁶ MARYLAND LAWS OF 1789, c. 8, sect. 2 (HERTY'S DIGEST OF THE LAWS OF MARYLAND, 1799, p. 250); 5 Statutes of South Carolina, 186 (1791); (1 SOUTH CAROLINA ACTS OF ASSEMBLY, 1791-1794, p. 88).

⁷ There is a decision that a statute providing for the regulation of the price of bread does not violate the state constitution. *Guillotte v. City of New Orleans*, 12 La. An. 432 (1857). See also *Mayor of Mobile v. Yuille*, 3 Ala. 137 (1841), for a *dictum* to the same effect. For a *dictum* that it is constitutional to fix the price of school-books, see *Polzin v. Rand, McNally & Co.*, 250 Ill. 561, 571, 95 N. E. 623, 625 (1911). There are several *dicta* that a general price-fixing law would be unconstitutional. See *American Surety Co. of New York v. Shallenberger*, 183 Fed. 636, 639 (1910); *Street v. Varney Electrical Supply Co.*, 160 Ind. 338, 345, 66 N. E. 895, 898 (1903). But see *Munn v. Illinois*, 94 U. S. 113, 125 (1876).

⁸ *Griffith v. State of Connecticut*, 218 U. S. 563 (1910) (upholding a state usury law).

⁹ *Clark v. Nash*, 198 U. S. 361 (1905) (upholding a Utah statute which permitted condemnation by individuals for the purpose of irrigating their lands).

¹⁰ See brief for the defendant in error in *Stettler v. O'Hara*, 243 U. S. 629 (1916).

¹¹ See James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 HARV. L. REV. 129.

¹² *Griffith v. State of Connecticut*, *supra*. That the protection of the buyers of goods is a legitimate motive for state action is recognized in *Central Lumber Co. v. State of*

The method employed was not regarded by the men who founded our nation as a violation of any fundamental right, and its use in modern times, in view of the circumstances, does not seem so unreasonable as to be an abuse of legislative discretion. If fixing the interest at which money can be lent is a reasonable method of preventing usury, regulation of the prices at which commodities can be sold seems to be a reasonable method of preventing exorbitant profits. The court intimates that, had the statute been confined to necessities, it might have been constitutional. But usury statutes cover all loans, whatever the purpose for which the money is to be used. Laws against monopolies and combinations in restraint of trade do not exclude monopolies and combinations in businesses which the community could do without.¹³ Certainly the Revolutionary price-fixing statutes made no distinction.¹⁴ Nor is it at all evident that the creation of the Montana commission with the general power to act where it thought action advisable was not a far more effective and more just measure than would have been an arbitrary demarcation of the ground which the commission could cover. The more elastic method of a commission is clearly preferable to the Revolutionary device of setting out the prices in the act. While the power given the commission is great, the provision for court review of any price-fixing claimed to be unreasonable would operate to prevent its abuse.

If the economic pendulum is in reality swinging back, courts should hesitate to declare the Constitution an obstacle in its path. Here the situation involves not a deliberate change in the theory of government but only a state's effort to meet a temporary and difficult problem. That the effort involved a greater swerving from the doctrine of "The Wealth of Nations" than the last few generations have seen is enough to raise the question of constitutionality, but it should not be enough to answer it. As Mr. Justice Holmes has said,¹⁵ "due process" is not synonymous with "laissez-faire"; it is more important that a state be allowed to meet its problems in its own way than it is to keep inviolate any theory of economic expediency.

EXTRATERRITORIAL ENFORCEMENT OF INHERITANCE TAX BY SUIT AGAINST BENEFICIARIES. — There are some limits to a sovereign's power to tax.¹ In our political system the power of each sovereign

South Dakota, 226 U. S. 157 (1912), where a statute making it criminal for any one engaged in the production, manufacture, or distribution of any commodity in general use to discriminate in price between different sections was held constitutional.

¹³ Central Lumber Co. v. State of South Dakota, *supra*.

¹⁴ See note 5, *supra*, and the comprehensive nature of the acts there cited. The Rhode Island Act of 1776, for instance, fixed the price of wheat, rye, corn, wool, pork, swine, beef, hides, salt, rum, sugar, molasses, cheese, butter, peas, beans, potatoes, stockings, shoes, cotton, oats, flax, coffee, tallow, turkeys, geese, charcoal, hard soap, English hay, teaming work, staves, tobacco, breeches, cocoa, beaver hats, lime, milk, and shaves.

¹⁵ "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U. S. 45, 75 (1905).

¹ "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State." Field, J., in *State Tax on Foreign-held Bonds*, 15 Wall. (U. S.) 300, 319 (1872).